ORIGINAL

Nos. 87-5170 and 87-5266

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN C. McCULLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY H. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners' racketeering convictions were subject to collateral attack because their convictions on some of the predicate acts, also charged as substantive crimes, were invalidated in response to this Court's decision in Dowling v. United States, 473 U.S. 207 (1985), when several convictions for wire fraud remained valid and supplied more than the requisite number of racketeering acts.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

87-5170

JOHN C. McCULLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

87-5266

JERRY H. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (87-5170 Pet. App. 1a-2a) is unreported. The opinion of the district court is reported at 639 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1987. The petition for a writ of certiorari in No. 87-5170 was filed on July 27, 1987; the petition in No. 87-5266 was filed on August 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners and others were on March 4, 1981, convicted on various counts relating to the operation of an enterprise involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. Petitioners were each convicted on one count of conspiracy to conduct an enterprise involving illicit reproduction of eight-track and cassette tapes through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1); a substantive RICO offense, in violation of 18 U.S.C. 1962(c) (Count 2); interstate transportation of the pirated tapes, in violation of 18 U.S.C. 2314 (Counts 4-9); and conspiracy to violate the copyright laws, in violation of 18 U.S.C. 371 (Count 50). Petitioners also were convicted on several counts of wire fraud, in violation of 18 U.S.C. 1343, petitioner McCulloch on five counts (Counts 20-24), and petitioner Jones on eight counts (Counts 13-19 and 21). Petitioner Jones was sentenced to a total of ten years' imprisonment; petitioner McCulloch was sentenced to a total of five years' imprisonment. _/ The court of appeals

---

_/ Petitioners' sentences were distributed over the various counts as follows:

> McCulloch was sentenced to consecutive terms of two years on Count 1, two years on Count 2, and one year on Count 4. He was also sentenced to concurrent terms of two years on each of Counts 5-9, two years on each of Counts 20-24, and one year on Count 50, all of these sentences to run concurrently with the sentence on Count 1.
>
> Jones was sentenced to terms of two years each on Counts 1, 2, 4, 5, and 6, each sentence to run consecutively. He was also sentenced to concurrent terms of two years each on Counts 7, 8, 9, and 13, five years each on Counts 14-19 and 21, and one year on Count 50, all of these sentences to run concurrently with the sentences on Counts 1, 2, and 4.

affirmed (United States v. Drum, 733 F.2d 1503 (11th Cir. 1984)), and this Court denied certiorari (469 U.S. 1061 (1984)).

Subsequently, this Court issued its decision in Dowling v. United States, 473 U.S. 207 (1985), in which it held that criminal penalties could not be imposed under the National Stolen Property Act, 18 U.S.C. 2314, for the interstate transportation of pirated records or tapes. Petitioners then moved, pursuant to 28 U.S.C. 2255, to have their convictions under that statute, as well as some of their other convictions, set aside. The district court vacated the convictions under 18 U.S.C. 2314 but rejected petitioners' arguments that their RICO and wire fraud convictions were also affected by Dowling. Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986). The court of appeals affirmed in a judgment order, relying on the district court's opinion (87-5170 Pet. App. 1a-2a).

2. The evidence at trial showed that from 1974 through 1979 petitioners and others were involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. Pirated tapes are made through unauthorized reproduction of copyrighted sound recordings. Petitioners conducted these operations in several states, including Florida, North Carolina, South Carolina, Kentucky, and Maine. By early 1979, the group had established three major interrelated and interdependent manufacturing operations, each of which bought and sold tapes and supplies from the others, shared information concerning law enforcement, and had common customers. During the time of the conspiracy, the entire enterprise manufactured, duplicated, and distributed over five million pirated tapes per year.

Petitioner Jones and co-defendant Ferrol McKinney worked together manufacturing pirated eight-track tapes. Jones duplicated the tapes and McKinney wound them, while another co-conspirator helped locate customers. Co-defendant Frances Lockamy assisted McKinney in processing orders for the pirated

tapes. Petitioners McCulloch and Jones picked up and delivered orders and raw materials. Co-defendant George Washington Cooper sold pirated tapes and provided Jones with background labels for pirated tapes. Tr. 1459-1469, 1477-1478, 1483-1489, 1491-1495, 1534-1535, 1545-1549, 1567-1569. _/

From October 1977 through June 1979, the FBI conducted an investigation of this enterprise, securing videotapes of the conspirators' conversations and the delivery and sale of pirated tapes. In addition, for a period during the spring of 1979, agents recorded conversations from the telephones of another co-conspirator, who later testified for the goverment at trial. The FBI eventually executed search warrants for the homes or business premises of several of the conspirators, including petitioner Jones. FBI agents recovered large quantities of pirated tapes and related supplies and equipment in the course of those searches.

3. In considering petitioners' motions for collateral relief, the district court concluded (639 F. Supp. at 178-179) that they were entitled to raise the issue of the validity of their convictions under 18 U.S.C. 2314, despite the fact that the same question had been decided against them on direct appeal, because there had been a significant change in the law by virtue of the Dowling decision, which could result in a finding that these convictions were "fundamentally defective." See Davis v. United States, 417 U.S. 333 (1974). The court then determined that the Dowling decision should be given retroactive effect, because it meant that petitioners had "been convicted of an act that the law no longer classifies as criminal" (639 F. Supp. at 179). Accordingly, the district court vacated petitioners' convictions on Counts 4-9, the counts based on the charge of interstate transportation of stolen property (ITSP) (ibid.).

_/ "Tr." refers to the trial transcript, found in volume 29 of the record in the court of appeals on the direct appeal.

Petitioners further argued in their Section 2255 motions that their RICO convictions should also be vacated as no longer supported by the requisite predicate acts. Both RICO counts had alleged predicate acts of racketeering consisting of the various counts of wire fraud and interstate transportation of stolen property charged as substantive counts 11 through 49 of the indictment. 639 F. Supp. at 180, 187. In addition to the six ITSP counts on which both petitioners were convicted, petitioner McCulloch was convicted on five counts of wire fraud, and petitioner Jones on seven counts of wire fraud, all of which were alleged as predicate acts of racketeering in the RICO counts.

Petitioners argued, relying on United States v. Dansker, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), and United States v. Brown, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), that there was no way of telling on which predicate acts the jury had relied in convicting on the RICO counts. In Dansker, the Third Circuit reversed one of two substantive bribery counts because of the insufficiency of the evidence, and then also reversed the conspiracy count, which had alleged as its objective one or the other of the two bribes charged in the substantive counts. The same court extended Dansker in Brown, a case involving a RICO conviction. Once the court reversed for insufficiency of the evidence two of the substantive counts that were alleged as racketeering acts, the court felt bound by the reasoning of Dansker to reverse the RICO counts as well, despite the fact that two valid substantive counts remained. 583 F.2d at 669. By analogy, petitioners here argued that because the jury might have based the RICO convictions on two of the invalid ITSP counts, the RICO counts must be reversed.

The district court rejected this argument, relying instead on the contrary reasoning of the former Fifth Circuit in United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied,

464 U.S. 965 (1983), which is controlling precedent in the Eleventh Circuit as well (639 F. Supp. at 181). The court in Peacock distinguished Dansker as a case that involved a conspiracy count alleging several possible objectives, where the jury's guilty verdict might have rested on an objective for which the evidence was insufficient. By contrast, the court reasoned, a RICO conviction requires only that the defendant be found guilty of two racketeering acts that are related to the affairs of the enterprise. Disagreeing with Brown, the court in Peacock concluded that as long as a defendant remained validly convicted of at least two racketeering acts, as revealed either in a special verdict or in the verdict on substantive counts, there was no reason to disturb the RICO conviction simply because some of the other substantive convictions were invalid. 654 F.2d at 348. The district court in this case, following the same reasoning, concluded that the RICO convictions remained valid because each petitioner had been convicted on multiple counts of wire fraud, leaving more than the minimum necessary predicate acts (639 F. Supp. at 182).

ARGUMENT

Petitioners here renew their challenge to their RICO convictions, claiming that the memorandum decision of the court of appeals affirming the district court in this case conflicts with the Third Circuit's holdings in Dansker and Brown, as well as with similar decisions of other circuits. First, the decision below was correct. Moreover, an examination of the cases shows that Brown was an unwarranted extension of Dansker and all the other conspiracy cases to which petitioners refer, so that the decision below does not even arguably conflict with any case except Brown, which has subsequently been limited and ignored by the Third Circuit. Finally, because Brown was decided on direct appeal while this case involves a collateral attack, there is no clear conflict between the results in the two cases.

1. As the former Fifth Circuit explained in United States v. Peacock (654 F.2d at 348), the Third Circuit's reasoning in Brown fails properly to understand RICO prosecutions. In order to sustain a conviction that rests on certain underlying findings -- such as a conspiracy or RICO verdict -- the court, of course, must be able to conclude that the jury did not rest its verdict on an invalid premise. In a RICO case, the verdicts on substantive counts that also constitute the predicate acts charged in the RICO offense serve the function of special verdicts, demonstrating that the jury did indeed find the defendant guilty of particular racketeering acts. If some of the convictions for predicate acts are later found invalid, but at least two valid convictions for underlying crimes remain, then it is still clear that the jury found the defendant guilty of at least two acts of racketeering for purposes of the RICO offense. This is especially true in this case where, as the district court noted (639 F. Supp. at 180), the wire fraud indictments incorporated the Government's account of the criminal conspiracy (id. at 186-187). The jury's decision to convict on the wire fraud counts therefore demonstrated that it found those acts of wire fraud to be in furtherance of the criminal enterprise charged in the substantive RICO and RICO conspiracy counts. _/ There is thus no reason to doubt that the jury made

---

_/ Because the wire fraud indictments incorporated a description of the RICO enterprise, the Third Circuit might well find the RICO convictions here permissible under Brown. In United States v. Riccobene, 709 F.2d 214, 228, cert. denied sub nom. Ciancaglini v. United States, 464 U.S. 849 (1983), that court of appeals explained that RICO convictions will be upheld under Brown "when the reviewing court can determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge." It is but a small step from that proposition to the conclusion that the RICO convictions should be upheld when the court is confident that the jury did rely on unchallenged predicate offenses, whether or not it may also have considered others. Indeed, the Third Circuit has upheld a RICO conviction, without citing Brown, where it invalidated some of the predicate convictions but left standing two or more convictions for RICO predicate offenses (United States v. Boffa, 688 F.2d 919, 934 (1982), cert. denied, 460 U.S. 1022 (1983)).

the findings necessary for a RICO conviction, and the court of appeals decided this case correctly.

As this discussion of the structure of RICO prosecutions shows, the Third Circuit's decision in Brown goes beyond its decision in Dansker and does so incorrectly. _/ The situation in a RICO case is quite different from one where, in a conspiracy count alleging several different objectives, the jury has been instructed that it can convict on the basis of any one objective. If any of those objectives is later found invalid or insufficiently proved, then the problem is that it cannot be determined whether the jury rested its verdict on an impermissible basis. United States v. Dansker, 537 F.2d at 51. Each of the cases other than Brown on which petitioners rely is similar to Dansker, involving multiple-object conspiracy counts where the jury was instructed that it could find any one of the objects in order to convict. United States v. DeLuca, 692 F.2d 1277, 1281 (9th Cir. 1982); United States v. Irwin, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Kavazanjian, 623 F.2d 730, 739 (1st Cir. 1980); United States v. Carman, 577 F.2d 556, 566-568 (9th Cir. 1978); Van Liew v. United States, 321 F.2d 664, 672 (5th Cir. 1963). _/

2. The court of appeals in Peacock acknowledged its disagreement with the Third Circuit in Brown and refused to extend the reasoning of Dansker to the RICO context (654 F.2d at

---

_/ No other court of appeals has adopted the reasoning in Brown. Both the Seventh Circuit (United States v. Anderson, 809 F.2d 1281, 1285 (1987)) and the Ninth Circuit (United States v. Lopez, 803 F.2d 969, 976 (1986), cert. denied, No. 86-6397 (Apr. 27, 1987)) have referred to Brown in cases where they found it inapplicable to the facts at hand; the Ninth Circuit specifically noted that it had not adopted the rule of Brown (ibid.).

_/ Even in that situation, however, some courts uphold the conspiracy counts. See, e.g., United States v. Dixon, 536 F.2d 1388, 1401-1402 (2d Cir. 1976); United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Tanner, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); Moss v. United States, 132 F.2d 875, 878 (6th Cir. 1943).

348). Similarly, the district court in this case noted the disparity between the two courts of appeals (639 F. Supp. at 181). The decision here, however, does not actually conflict with the decision in Brown, which involved a direct appeal rather than a collateral attack. _/

As noted above, the district court in this case concluded that petitioners were entitled to the benefit of this Court's decision in Dowling, although their convictions already had been affirmed, because conviction for acts no longer considered criminal constitutes a "complete miscarriage of justice." See Davis v. United States, 417 U.S. at 346. Thus they were entitled to relief under 28 U.S.C. 2255, and the district court properly vacated their convictions for interstate transportation of stolen property. It is quite another matter, however, to make the derivative claim that vacation of the ITSP counts further mandates reversal of the RICO counts, particularly when the jury's verdicts of guilty on each of the substantive wire fraud counts specifically show that petitioners were found guilty of more than the requisite number of racketeering acts. As our discussion above demonstrates, reversal of the RICO conviction because of unrealistic and attenuated doubts as to the basis for the jury's verdict is a questionable action on direct appeal; there is certainly no reason to allow such relief on collateral review.

As this Court stated in United States v. Addonizio, 442 U.S. 178, 184 (1979) (footnotes omitted): "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds

---

_/ We note in addition that in Brown the Government had conceded that Dansker required reversal at least of the RICO conspiracy count (583 F.2d at 669). It is impossible to say how the Third Circuit would have decided the case in the absence of such a concession.

for collateral attack on final judgments are well known and basic to our adversary system of justice." The Court has repeatedly held that a claimed error, in order to justify relief on collateral review, must be so fundamental that it would result in a "complete miscarriage of justice." Id., at 184-185; Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); Davis v. United States, 417 U.S. at 346; Hill v. United States, 368 U.S. 424, 428 (1962); cf. Houser v. United States, 508 F.2d 509, 513-518 (8th Cir. 1974). Petitioners' claim that their RICO convictions are flawed rests on the suggestion that the jury, although convicting them of acts of wire fraud described in the indictment as part of the ongoing RICO project, may have thought that those acts were not related to the RICO enterprise. Such a speculative, attenuated objection does not suggest a fundamental error. Further review would be inappropriate. _/

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

OCTOBER 1987

_/ Petitioner Jones also argues (87-5266 Pet. 10-12) that another effect of the decision in Dowling is to constructively amend the indictment, in violation of his right to be indicted by a grand jury. The courts below correctly rejected this claim, which is insubstantial. As the district court pointed out, petitioner could cite no case in support of his argument that a post-conviction change in the law acts to amend an indictment. Furthermore, there is no reason to distinguish this situation from one in which convictions are reversed on appeal based on insufficient evidence or trial error; in such cases it is never suggested that the indictment has been constructively amended by the action of the appellate court. Finally, the district court observed that it would be anomalous for the defendants to argue on one hand that their convictions should be modified because of the Dowling decision, and on the other hand to claim that those modifications impermissibly amend the indictment. 639 F. Supp. at 183.